PETROGALI SDN BHD

v.

SUPRAMANI AUMBOORAN & ORS

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING SUMMONS NO: R2-25-120-1999]
19 JULY 2000

LABOUR LAW: *Employment - Dismissal - Dismissal of employee due to loss of company's contract with another - Whether loss of contract was due to fault of company - Whether company could no longer sustain employee - Whether company should have retrenched employee with benefits - Whether employee's contract of employment provided for termination of service*

LABOUR LAW: *Industrial Court - Award - Whether award in excess of employee's entitlement under contract of employment*

The applicant applied to quash the award of the fifth respondent, *ie*, the Industrial Court, granting the first four respondents ('four respondents') backwages and compensation *in lieu* of reinstatement. That was a result of the four respondents' claim at the Industrial Court that their dismissal by the applicant was without just cause and excuse.

The applicant claimed, *inter alia*, (i) that the fifth respondent failed to consider that the applicant had to dismiss the four respondents due to the termination of its contract with Esso Production Malaysia Inc. ('EPMI'); (ii) that the contracts of employment of the four respondents provided for the termination of their services; and (iii) that the quantum of award was far in excess of the four respondents' entitlement under their contracts of employment.

Held:

[1] When a dispute is referred to the court under s. 20 Industrial Relations Act 1967, the issue is not whether the workman's service is terminated according to the contract of service but whether his services has been terminated with or without just cause and excuse. Thus, the applicant had no justification for the dismissal of the four respondents since it did not dispute that they were not dismissed for any misconduct, negligence or poor performance.

[2] The applicant failed to produce convincing and compelling evidence that it was unable to continue employing the four respondents. In fact, evidence showed that it was due to the applicant's own fault that its contract with EPMI was cancelled.

[3] If it was not viable for the applicant to keep its ninety-six workers including the four respondents, the applicant should have retrenched them and given them retrenchment benefits. That the applicant failed to do.

[4] The award of backwages and salary *in lieu* of reinstatement was not tied up to any contractual terms. The four respondents were compensated for having their employment terminated without just cause and excuse. Thus, the applicant's complaint that the quantum of award was far in excess of their entitlement was totally misconceived.

[Application dismissed.]

Case(s) referred to:
Amanah Butler (M) Sdn Bhd v. Yike Chee Wah [1997] 2 CLJ 79 ***(refd)***
Dr A Dutt v. Assunta Hospital [1981] 1 MLJ 304 ***(foll)***
M/s Gary Yuen & Tan v. Diana Ann Seah & Anor [1999] 5 CLJ 595 ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(foll)***
Petrogali Sdn Bhd v. Supramani Aumbooran & Ors [1999] 3 ILR 18 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20
Rules of the High Court 1980, O. 53 r. 1(2)

Other source(s) referred to:
The Contract of Employment, Clarendon Press Oxford 1976, MR Freedland, p 323
Indian Contracts Act and Specific Relief Act, Pollock & Mulla, 10th edn, p 472

For the applicant - Manjit Singh Saini; M/s Harun Idris, Yeoh & Partners
For the respondents - C Soosaynathan; M/s Christie Soosay Nathan & Assoc

Reported by Usha Thiagarajah

JUDGMENT

Faiza Tamby Chik J:

The first, second, third and fourth respondents (hereinafter called the "four respondents") were at the material time employed by the applicant who were carrying on the business of off-shore food caterers. The four respondents were terminated from the employment of the applicant by letter dated 25 October 1996. Being dissatisfied with the abovesaid termination, the four respondents made representations to the Minister of Labour, to the effect that their dismissal were without just cause or excuse and sought *inter alia*, to be

reinstated to their previous employment. The Minister of Labour referred the said representations to the fifth respondent (*ie*, the Industrial Court) to adjudicate on the same. The fifth respondent then published its award, *ie*, Award No. 536 of 1999 (hereinafter called "the award") on 18 October 1999, granting the four respondents backwages and compensation in lieu of reinstatement. The applicant being dissatisfied with the award has filed the present proceedings wherein it seeks to quash the award.

The applicant has enumerated the reasons why the originating motion should be allowed at paras. 13 to 16 of the affidavit of one Kaljeet Kaur affirmed on 25 November 1999 (encl. 3) and in its statement pursuant to O. 53 r. 1(2) of the Rules of the High Court 1980. For ease of reference, the relevant portions of the above said paragraphs are reproduced as follows:

Paragraph 13(a):

> The fifth respondent had erred in law in failing to appreciate that s. 20(3) Industrial Relations Act 1967 allows for reinstatement only when reinstatement is possible. It is observed that this sub-paragraph is misconceived in law because no where in s. 20(3) is it set-out that "reinstatement will only be allowed when reinstatement is possible.

Paragraph 13(b):

> The fifth respondent had erred in law by failing to appreciate that when reinstatement is impossible, an award for compensation cannot be made *in lieu* of reinstatement and

Paragraph 13(p):

> The Fifth respondent erred in law in coming to the conclusion that there can be an order for compensation *in lieu* of reinstatement even though reinstatement is impossible as the applicant had entirely ceased business operations after its sole business contract with Esso Petroleum Malaysia Inc. was terminated on the 25th of October, 1996.

It is noted here that at the trial the applicant's position was that it was performing contractual off shore catering services for one Esso Production Malaysia Inc. ("EPMI"), and EPMI Contract No. FCB 403 was terminated by EPMI on 31 October 1996. The applicant was no longer able to carry on business and therefore had to terminate the services of the four respondents. The applicant however failed to demonstrate at the hearing before the fifth respondent that it was unable to continue to keep the four respondents in its employment because the EPMI Contract No. FCB 403 itself was not tendered in evidence, and the applicant failed to tender its profit and loss accounts and/or any other document to demonstrate that it was no longer financially able to continue employing the four respondents. If at all the applicant was not

able to continue to keep the four respondents in its employment because of a financial downturn, the applicant would have been legally bound to pay the four respondents retrenchment benefits by virtue of the Employment (Termination and Lay Off Benefits) Regulations 1980. The applicant however made no payment of the said retrenchment/termination benefits whatsoever.

Paragraph 13(c):

> The fifth respondent erred in law in failing to appreciate that it could not rely on the evidence of the second respondent which had been destroyed in cross-examination, in particular, the second respondent's claim, that he had not signed any contract of employment.

Paragraph 13(e):

> The fifth respondent erred in law in ignoring the evidence tendered in court pertaining to the inability of the applicant to pay and that the applicant had ceased all business operations, and had no assets whatsoever.

Paragraph 13(n):

> The fifth respondent acted in disregard of procedural propriety and fairness by failing to appreciate that the applicant had proved its case on the required standard of proof which was on "a balance of probabilities"

Paragraph 13(r):

> The fifth respondent erred in law by rejecting the documentary evidence tendered to court by the applicant, in particular the contracts of employment between itself, and the first, second, third and fourth respondents and the letters from Esso Petroleum Malaysian Inc. terminating the services of the applicant. The documents tendered to the court are annexed herewith and collectively marked as "Exhibit P4".

Paragraph 13(s):

> The fifth respondent erred in law by taking into consideration irrelevant facts raised by the first, second, third and fourth respondents.

Paragraph 13(t):

> The fifth respondent acted irrationally in failing to take into consideration the oral and documentary evidence presented by the applicants' managing director and its administrative officer.

Paragraph 13(u):

> The fifth respondent acted irrationally in failing to take into consideration, the fact that the applicant acted only as a recruiting agency for the labour requirements of Esso Petroleum Malaysia Inc.

Paragraph 13(w):

> The fifth respondent acted irrationally in failing to take into consideration the contracts of employment and the fact that the said contracts of employment were for the fixed term of the duration of the applicant's contract No. FCB 403 with Esso Petroleum Malaysia Incorporated (E.P.M.1) and

Paragraph 13(x):

> The fifth respondent erred in law and acted irrationally when it failed to consider that the said Contract No. FCB 403 had been terminated by E.P.M.I. on 25 October 1996 and that the applicant's only business was the provision of services under Contract No. FCB 403 and that the said applicant is no longer in business since the date of termination of the said Contract No. FCB 403 by E.P.M.I. on 25 October 1996.

Exhibit "P2" of Kaljeet Kaur's affidavit is Esso's letter cancelling its contract with the applicant. The letter reads:

> We refer to our faxed letters dated October 24, 1996, whereby we clarified our offer to further extend the duration of your catering services at Guntong A/D, Irona Barat and Jerneh A for a period of 3 months upon expiry of the current extension term. As you have failed to respond yesterday by 1700 hours, despite reminders by telephone, you are deemed to have declined EPMI'S extension offer and the said offer is thereby withdrawn. In view of the above, we wish to advise you that Contract No. FCB 403 shall expire on October 31, 1996. As such please make the necessary arrangements to demobilize your personnel and supplies from the above platforms by the said date.

From the terms of the above said letter it appeared that it was due to the applicant's own fault that the contract No. FCB 403 was cancelled. It is observed also that the abovesaid sub-paragraph pertain primarily to evaluation, acceptance and/or rejection of evidence by the fifth respondent. This is a matter which is fundamentally within the domain of the fifth respondent and the High Court in the exercise of its review jurisdiction will in all cases be extremely reluctant to venture into the exercise of evaluating the evidence adduced before the fifth respondent. This was amply demonstrated in the case of *M/s Gary Yuen & Tan v. Diana Ann Seah & Anor* [1999] 5 CLJ 595, where at pp. 597-598 Azmel J said:

> The applicant in alleging that the Industrial Court had committed various errors of law in arriving at the conclusion that the termination was without just cause or excuse gave eight grounds as mentioned in its statement made under O. 53 r. 1(2) Rules of the High Court 1980. Sad to say that all the grounds are concerned with questions of facts. This is not an appeal from the decision of the Industrial Court. This is an exercise of judicial review which cannot be equated with that on an appeal. As I have mentioned earlier, courts would be

> very slow in disturbing any finding of facts unless the conclusion arrived at by the court is so absurd that no reasonable person can accept it. In this case, I was unable to find anything to say that the Industrial Court had arrived at an absurd conclusion which in law can be regarded as having acted in excess of jurisdiction.

The applicant submitted that it was a known fact that the applicant could not keep the respondents in its employment on account of the frustrating event of non-renewal of the catering contract by ESSO. The applicant went on to say that as a result of this, the applicant had to cease business operations. In the award of the fifth respondent at p. 5, the fifth respondent had correctly set-out that in industrial jurisprudence the burden of proof lies on the employer. It was evident from pp. 7 and 8 of the award that:

(1) contract No. FCB 403, which said cancellation purported to be the backbone of the applicant's case was not tendered in court;

(2) the applicant failed to demonstrate that it was financially unable to continue to keep the four respondents in its employment by failing to tender its profit and loss accounts;

(3) the applicant never produced any evidence that they were not to be blamed for the termination of contract FCB 403. In fact the terms of the letter to termination evidence that it was the applicant who was to blame;

(4) the applicant's claim that legal proceedings had been instituted by them on the grounds that they had been wrongfully terminated by ESSO but had failed to tender in evidence copies of the relevant court documents;

(5) the applicant asserted that it was an accepted trade practice that in the off-shore catering business once an employer ceases business, all its workers would be re-employed by the new contractor. The applicant failed to prove the existence of such trade practice. In fact pp. 6 and 7 of the award demonstrates that the first and third respondents gave evidence to the effect that they were unable to gain employment with the new contractor although they had duly applied for the same.

In the light of the above, the fifth respondent was absolutely correct in its findings as as demonstrated in the 2nd paragraph of p. 11 of the award which read as follows:

> It is also pertinent to note that although the company endeavoured to show that it was unable to continue employing the claimants because the contract with EPMI was its only contract, that its existence depended solely on the contract, that it had made losses and that it was commencing legal proceedings against EPMI for wrongful termination of contract, it failed to produce convincing and compelling evidence to prove these assertions.

The applicant quoted from *"The Contract of Employment"* Clarendon Press Oxford 1976 by MR Freedland, at p. 323 which stated:

> it is an accepted general principle of the law of contract that the doctrine of frustration operates to produce an automatic termination of the contract concerned. By that it is meant, firstly, that the contract is terminated as a direct consequence of the frustrating event and independently of the act of either party in treating the contract as terminated.

The authors of Pollock & Mulla on *Indian Contracts Act and Specific Relief Act*, 10th edn, at p. 472 stated:

> Self-induced: Another principle is that a state of facts brought about by the act of a party cannot be used as an excuse for failure to perform a contractual obligation. The doctrine of frustration under Indian law does not apply cases of non-performance of the contract due to events happening because of the default of the contracting party himself. Clearly the doctrine of frustration cannot avail a defendant when the non-performance is attributable to his own default. It is the essence of frustration that the event which causes frustration must have occurred without the fault of either party.

The applicant had done nothing to demonstrate that they were not at fault in respect of the alleged frustrating event, *ie*, the termination of Contract No. FCB 403. Clearly the plaintiff had not made out its claim of frustration of contract in the instant case. On the contrary the letter of termination was clear evidence that it was in fact the applicant who was at fault.

Paragraph 13(d):

> The fifth respondent in ignoring the clear unambiguous terms and provisions of the contracts of employment between the applicant and the first, second, third and fourth respondents as well as the fact that there existed fixed term of contracts of employment between the applicant and the first, second, third and fourth respondents committed a flagrant breach of the fundamental principles of contractual law. The said contracts of employment which was annexed to the claimants' bundle of documents, and were in the statement of case at p. 33 were put in evidence through the parties' witness. It can be seen here that the court also erred in law in ignoring the extensive evidence tendered into court by both parties pertaining to the terms and effect of the said contracts of employment;

Paragraph 13(g):

> The fifth respondent had arrogated to itself a power and jurisdiction that did not exist in making an award far in excess or the entitlement that could be legitimately due to the first, second, third and fourth respondents by reason of the fixed terms contracts of employment and in coming to the conclusion that the court could consider exercising its discretion to award monetary compensation despite the fact that reinstatement was impossible as the applicant was forced for reasons beyond its control, to completely cease all business operations.

Paragraph 13(h):

> The fifth respondent, in ignoring the express unambiguous provisions of the contracts of employment between the applicant and the first, second, third and fourth respondents which provides for termination of the services of the first, second, third and fourth respondents during the duration of the term of the said Contracts of Employment has caused a serious miscarriage of justice to the applicant contrary to be object and spirit of the Industrial Relations Act 1967.

Paragraph 13(i):

> The fifth respondent erred in law in rejecting the express provisions of the Contract of Employment between the parties.

I am of the opinion that irrespective of the contractual position of the parties, the principal issue to be determined is whether the termination of the four respondents was with "just cause and excuse". This is borne out in the Federal Court's decisions in *Dr. A Dutt v. Assunta Hospital* [1981] 1 MLJ 304 and *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 2 MLJ 129. In both cases the Federal Court held that even if there was a contractual provision for termination by notice it must still be with "just cause and excuse". This the applicant failed to do, because it failed to demonstrate that it did not have the financial means to keep the four respondents in their employment while they sought alternative sources of business. I am of the opinion that the fifth respondent had a firm grasp of the relevant issues and the applicable law and this is amply demonstrated from the terms of the award itself, the relevant portion of which is (see encl. 3):

> In this case it is abundantly clear that although the claimants' services were terminated by the company it was not for any misconduct, negligence or poor performance on their part. The crux of the company's case is that the claimants' services were terminated in accordance with cl. 21(d) of their contracts of service with the company which provides:
>
> (21) Walau bagaimanapun pihak syarikat berhak menamatkan perkhidmatan anda tanpa sebarang notis atau gaji ganti notis di atas salah satu sebab-sebab yang berikut:
>
> (a) ...
>
> (b) ...
>
> (c) ...
>
> (d) Sekiranya pihak pelanggan menamatkan perkhidmatan kontrak dengan pihak Syarikat.

Now as stated above it is trite that when a dispute is referred to court under s. 20 of the Industrial Relations Act 1967, the issue is not whether the workman's service had been terminated according to the contract of service but whether his services has been terminated with or without just cause and excuse. Therefore it appears that the company had no justification for the claimants' termination or dismissal since it did not dispute that the claimants were not dismissed for any misconduct, negligence or poor performance.

In the case of *Dr A Dutt v. Assunta Hospital* [1981] MLJ 304, the Federal Court enunciated at p. 312 B-D as follows:

> It follows, in our view, that the letter and spirit of the Act which Mr. J. Puthucheary concedes as extending to protect workmen who are members of a trade union from dismissal without just cause and excuse extend the same production to the workman who is just a member of a trade union; so that despite the contractual provision of termination by notice, such a workman who considers he has been dismissed without just cause or excuse may make representations for reinstatement. It further follows that on a proper interpretation of the relevant sections of the Act, there is no material distinction between dismissal and termination. Either must be with just cause or excuse to be justifiable; otherwise the Industrial Court may make an award.

In *Goon Kwee Phoy v. J & P Coats (M) Bhd* [1981] 2 MLJ 129, the Federal Court said at p. 136:

> But on the finding that there was no redundancy as suggested by the company the conclusion is inevitable that the termination was without the cause or excuse advanced and therefore without just cause or excuse.
>
> We do not think that having regard to the company's pleadings in the Industrial Court, the High Court was correct to consider the ground of termination by due notice, which had not been relied on in the Industrial Court, but assuming that it is possible for it to do so since this question was raised in the statement in support of the application for *certiorari*, we are of the opinion for the reasons given by this court in *Dr. Dutt*'s case, that termination by due notice but without just cause or excuse is a dismissal in respect of which the Industrial Court can make an order for reinstatement or an award of compensation *in lieu* of reinstatement.

It is also pertinent to note that although the company endeavoured to show that it was unable to continue employing the claimants because the contract with EPMI was its only contract, that its existence depended solely on the said contract, that it had made losses and that it was commencing legal proceedings against EPMI for wrongful termination of contract, it failed to produce convincing and compelling evidence to prove these assertion. In any event the company failed to show that having lost the contract with EPMI it

had looked for an alternative contract or that it had tried to assist its workers to get continued employment with the new contractor taking over the contract from EPMI. If it was true as contended by the company that it was not viable any more to keep its ninety-six workers including the claimants, in other words, they have become surplus and need to be discharged, then the company should have retrenched them and given retrenchment benefits to them. However this the company failed to do.

Paragraph 13(g):

> The fifth respondent had arrogated to itself a power and a jurisdiction that did not exist in making an award far in excess of the entitlement that could be legitimately due to the first, second, third and fourth respondents by reason of the fixed term of contracts of employment and in coming to the conclusion that the court could consider exercising its discretion to award monetary compensation despite the fact that reinstatement was impossible as the applicant was forced for reasons beyond its control, to completely cease all business operations.

The applicant's complaint that the quantum of the award was far in excess of the entitlement of the four respondents by virtue of the terms of the contract of employment was totally misconceived. This was because the award of backwages and salary *in lieu* of reinstatement was not tied up to any contractual terms but instead was compensation to the four respondents, for having their employment terminated "without just cause and excuse". Therefore I conclude that the High Court in exercising its review jurisdiction will be reluctant to interfere with the calculation of the compensation payable and this was amply demonstrated in the case of *Gary Yuen & Tan v. Diana Ann Seah & Anor* [1999] 5 CLJ 595 at p. 598, Dato' Azmel J said:

> On this issue of quantum of compensation awarded by the Industrial Court to the first respondent amounting to RM135,000 which included backwages for a period of 28 months and compensation for loss of employment for a period of three years (being the ninth ground of allegation put up by the applicant), I was fully satisfied that the Industrial Court in arriving at that amount of compensation had made sure of correct principles as stated in its award. As such, I do not think it would be proper to disturb it.

In the instant case, the award of backwages was only for 24 months, while compensation *in lieu* of reinstatement was one month's salary for every year of service. I am of the opinion in the circumstances the quantum of compensation was very much in order. The applicant submitted that the case of *Amanah Butler (M) Sdn Bhd v. Yike Chee Wah* [1997] 2 CLJ 79 is authority for the proposition that full backwages cannot be paid without considering what attempts were made to mitigate loss. I think this submission is devoid of merit. A fuller examination of the *Amanah Butler* case reveals that:

(i) the employees' claim in the Industrial Court was dismissed. Therefore there had been no quantification of backwages and compensation;

(ii) the High Court granted a *certiorari* to have the decision quashed;

(iii) the Court of Appeal dismissed the appeal. The Court of Appeal while it had the power to grant backwages and compensation held that since it did not have the benefit or argument, upon the quantum, it was therefore best left to the Industrial Court to make the assessment. The Court of Appeal also held that since the employee had joined another stockbroking firm, reinstatement would serve no useful purpose and therefore took the view that the proper remedy was compensation *in lieu* of reinstatement. At p. 93 of the report it is stated:

> The respondent was in managerial position. The circumstances in which he left the appellant show that mutual trust is lacking. After he was dismissed, he joined a stockbroking firm. No useful purpose will be served from uprooting him from his present place of work and thrusting him upon the appellant. Taking into account all the facts and circumstances of the case, we are of the view that the proper remedy in this case is compensation *in lieu* of reinstatement.
>
> We have the power and the jurisdiction to grant that relief here and now despite the fact that we intend to dismiss the appeal. See, *Harris Solid State (M) Sdn. Bhd. & Ors v. Bruno Gentil Pereira & Ors (supra)*. The view which this court took in that case has since been approved by the Federal Court. See *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Haji Mohd. Noh, Supreme Court Civil* Appeal No. 02-57-93, yet unreported.
>
> In the present appeal we have not had the benefit of any argument upon the quantum. It is therefore best that the matter be left to the Industrial Court to make the assessment.

It is noted that neither the Kaljeet Kaur affidavit nor the applicant's statement of reply sets-out that the remaining 92 of the applicant's workers were taken in by the new contractor. As stated earlier, the award itself records the first and third respondents as saying in evidence that they applied for employment with the new contractor but were unsuccessful.

Paragraph 13(o):

> The Applicant verily believe that the first, second, third and fourth respondents employed various tactical strategies to frustrate the course of justice contrary to the spirit and object of the Industrial Relations Act 1967; and the fifth respondent had demonstrated its incompetence to effectively and fairly deal and dispose off the Ministerial Reference.

It is my view that the contents of this sub-paragraph can be described as mischievous. The applicant did not set out what the alleged "tactical strategies" were, nor did it give particulars with regard to the same. The unkindest cut of all, must surely be the last sentence of the said sub-paragraph which reads "And the fifth respondent had demonstrated its incompetence to effectively and fairly deal and dispose off the ministerial reference." The allegation of incompetence hurled at the fifth respondent was totally unwarranted. It was particularly disheartening to note that the said affidavit was prepared with the benefit of advice from the applicant's solicitors (see para. 2 of the affidavit of Kaljeet Kaur affirmed on 25 November 1999, *ie*, encl. 3).

Paragraph 13(v):

> The fifth respondent erred in law and acted irrationally in failing to take into consideration relevant case-law cited by the applicant. The fifth respondent acted irrationally in taking into consideration irrelevant case-law cited by the respondents.

It is to be noted that the allegations contained in this sub-paragraph is devoid of particulars and therefore merit. With regard to sub-paras 13(i),(j), (k), (l) and (m) of the Kaljeet Kaur affidavit it is observed that these sub-paragaphs were merely repetition of the earlier abovementioned sub-paragraphs of the Kaljeet Kaur affidavit.

In the premises, the originating motion is hereby dismissed with costs.